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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NOBERTO VELASQUEZ CARRILLO,
JR.,

Defendant and Appellant.

H032658

(Monterey County
Super. Ct. No. SS071178)

Defendant Noberto Velasquez Carrillo, Jr. appeals a judgment following his conviction as a result of a no contest plea to rape of an intoxicated person in violation of Penal Code, section 261, subdivision (a)(3).¹ Defendant challenges the trial court's denial of his motion to suppress evidence pursuant to section 1538.5.

STATEMENT OF THE FACTS AND CASE

On February 15, 2005, Jane Doe was at a party at defendant's apartment that he shared with his wife and Doe's friend, Monica Diaz. When she arrived at the party, she met three other men there besides defendant. These men were named "Abel,"

¹ All further statutory references are to the Penal Code.

“Guillermo” and “Snickers.”² It was later learned that “Abel’s” true name was Fernando Diaz, and “Guillermo’s” true name was Xavier Beasley.

The men encouraged Doe to drink approximately 10 shots of tequila and to smoke a marijuana cigarette. After some time, Doe threw up and passed out.

When Doe woke up, she was lying on her back in a dark room. Diaz was holding her legs and talking to Beasley at the time Doe woke up. Diaz then got on top of Doe and inserted his penis into her vagina. Diaz then turned Doe over and inserted his penis into her anus. Diaz tried to turn Doe back over, but she resisted. Diaz then got off of Doe, and masturbated by the side of the bed and walked into the bathroom.

Doe got up and got dressed. She began to look for her purse. Doe went into defendant’s room where he was asleep in a bed with his wife, Monica. Doe found her purse and discovered that there was some money missing. Doe said that she would call the police if the money was not returned to her. Beasley and Diaz left the apartment.

Monica asked Doe what happened, and Doe told her Diaz had raped her. Doe then called her boyfriend, Quinn Smith, and he came to pick her up.

The day after the party, on February 11, 2005, Doe reported the incident to the police, and was examined by a sexual assault specialist. Doe told the examiner that she had consensual sexual intercourse three days earlier, on February 8, 2005. The examiner took rectal and vaginal swabs from Doe, and found sperm on the vaginal swab. On April 11, 2005, Doe viewed a photographic lineup, and identified Diaz as the man who raped her.

As part of the investigation, Fernando Diaz gave a statement to the police. He said he remembered Doe becoming drunk and passing out at the party. Diaz said he did not

² The person named “Snickers” was mentioned by Doe only at the outset of her account of the night of the party. No other witnesses mentioned “Snickers” at the party that night.

have sex with Doe, but he changed his story, and ultimately said he had had consensual intercourse with Doe, but that he had ejaculated on the ground next to her.

Fernando Diaz was charged with rape and sodomy of Doe, and voluntarily supplied a DNA sample that was tested against the profile created by the semen that was taken from the vaginal swab. The DNA samples did not match.

The police obtained a sample of Xavier's Beasley's DNA from a sample in the DNA databank. Beasley's sample did not match the DNA profile from Doe's vaginal swab.

Quinn Smith was Doe's boyfriend at the time of the party, and he voluntarily provided a DNA sample to the police. Smith's DNA did not match the DNA profile from Doe's vaginal swab. Smith told the police he did not have sexual intercourse with Doe immediately after the rape, and that he could not remember when he had had sexual intercourse with her before the rape.

Defendant gave a statement to the police. He said he and his wife, Monica, had a party at their apartment, and the only people there were Doe, Fernando Diaz, and a man who went by the nickname "B." Defendant said that later in the night, another man and woman came to visit "B," but they left soon thereafter. Defendant said he remembered Doe throwing up in the bathroom and lying on the couch. Defendant said he fell asleep early in the morning, and at the time, only Doe and Diaz were present in the apartment. When defendant woke up the next morning, he heard Doe saying that someone had stolen her money. Defendant then drove Diaz home, and while in the car, Diaz told defendant he had consensual sex with Doe the night before.

The police made contact with defendant six months after the party, and asked him for a DNA sample. Defendant initially voluntarily agreed to provide a sample, but after talking to an attorney, he decided not to provide a sample.

On May 7, 2007, defendant was charged by information with one count of rape of an intoxicated person, in violation of section 261, subdivision (a)(3). The information

also alleged that defendant suffered two prior juvenile adjudications for serious felonies pursuant to section 1170.12, subdivision (c)(1).

Defendant moved to suppress evidence of his DNA from a saliva sample that was taken pursuant to a search warrant. On August 16, 2007, the court denied the motion to suppress, stating: “I’ve got a factual scenario where there are a finite number of people at the location. I’ve got a DNA result from a swab, supposedly the semen, from the victim. And I’ve got every male at the house except one who’s been excluded from the DNA test.” Under these circumstances, the court found probable cause to justify the search warrant for a DNA sample from defendant. The day after denying the motion to suppress, the court granted defendant’s motion to strike his two prior juvenile adjudications.

Following the court’s denial of his motion to suppress, defendant pleaded no contest to one count of rape of an intoxicated person. As part of a negotiated disposition, defendant was sentenced to an eight-year prison term. Defendant filed a timely notice of appeal.

DISCUSSION

On appeal, defendant asserts the warrant for a sample of his saliva for DNA testing was not supported by probable cause and if we find the warrant was not supported by probable cause, the good faith exception for execution of a search warrant should not apply in this case.

Probable Cause for the Search Warrant

Whether a warrant is supported by probable cause is assessed by the “ ‘totality of the circumstances’ ” presented to the magistrate. (*Illinois v. Gates* (1983) 462 U.S. 213 (*Illinois*). “The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” (*Illinois, supra*, 462 U.S. at p. 238.)

Our task on review is to determine “whether the magistrate [issuing the warrant] had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1040.) The supporting affidavit will be held invalid by a reviewing court only if, as a matter of law, it fails to set forth sufficient competent evidence to support the magistrate’s finding of probable cause, giving full weight to the magistrate’s function as finder of fact. (*Id.* at p. 1041.) This standard of review is deferential to the magistrate’s determination. (*Illinois, supra*, 462 U.S. at p. 236; *People v. Thuss* (2003) 107 Cal.App.4th 221, 235.) “In assessing the affidavit’s facts it is possible to imagine ‘[s]ome innocent explanation But “[t]he possibility of an innocent explanation does not deprive the [magistrate] of the capacity to entertain a reasonable suspicion” ’ [Citation.]” (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1784.) “Doubtful or marginal cases are resolved in favor of upholding the warrant. [Citations.] The burden is on [the defendant] to establish invalidity of [a] search warrant[.]” (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278.)

The affidavit in support of the warrant stated that defendant and some other men were with Doe at a party at defendant’s apartment, and the men encouraged Doe to drink a large amount of tequila. Doe passed out, and woke up to find Fernando Diaz (“Abel”) raping her. Doe reported the rape to the police the next day, and was examined by medical personnel. The medical examination showed that Doe had semen in her vagina. During the investigation, the police determined that the only men who were present in the apartment while Doe was passed out were defendant, Fernando Diaz and Xavier Beasley. The police obtained DNA samples from Diaz and Beasley, and neither matched the semen sample taken from Doe’s vagina. The police also obtained a DNA sample from Doe’s boyfriend, Smith, because Doe told police she had consensual sex two days before the party. Smith’s DNA did not match the DNA from the semen taken from Doe’s vagina. The police opined that since defendant was the only other person present at the

apartment the night she passed out and was raped, and none of the other men's DNA tested matched the DNA in the semen from her vagina, that there was a fair probability that defendant was the source of the semen.

Defendant argues at length that the affidavit in support of the warrant did not conclusively link defendant to the crime, and merely placed defendant in the apartment when the crime occurred. Defendant further argues that presence at the scene of the crime is not enough to establish probable cause to support a search warrant.

It is certainly true that presence at the scene of a crime does not create probable cause. (*Ybarra v. Illinois* (1979) 444 U.S. 85, 91.) However, the affidavit in this case did more than just place defendant at the scene of the crime. Rather, it laid out the entirety of the police investigation, and eliminated other suspects as possible donors. The affidavit included the fact that (1) Doe said she passed out and awoke to being raped by Diaz; (2) Diaz did not ejaculate inside of Doe; (3) the DNA was tested from all males at the house at time Doe was passed out, except for defendant, and none of them matched the DNA of the semen; and (4) after Doe told police she had consensual sex 48 hours before the rape, the DNA of Doe's boyfriend, Smith was also tested and ruled out as a match of the semen. Because defendant was the only other male in the apartment at the time Doe was passed out, the evidence ruling out other men demonstrated that defendant was not merely present at the time of the crime, but was probably that person who supplied semen.

In his reply, defendant focuses on the fact that Doe mentioned to police that when she arrived at the party, there was a fourth man there, named "Snickers," and that "Snickers" was not conclusively ruled out as the source of the semen.

It is important to note that with regard to "Snickers," no other witness stated the "Snickers" was present at the party other than Doe, and all of the witnesses were consistent that defendant, Diaz and Beasley were the only men present when Doe was passed out. The fact that "Snickers" was not eliminated as the source of the semen does

not reduce the probability that defendant was the source of the semen found on Doe's vaginal swab.

Defendant asserts the elimination of other possible men in the apartment at the time of the rape as support for a search of defendant is "fatally flawed," because the affidavit "did not establish a known, finite universe of potential sources for the semen, and therefore failed to establish that [defendant] was the only potential source that had not been tested."

While it is true the affidavit did not conclusively link defendant to the crime, to the exclusion of any and all other males, it is not required to be that precise. The affidavit need only produce enough facts, the totality of which produce a strong possibility that the search will lead to the sought after evidence. (*Illinois, supra*, 462 U.S. at pp. 238-239.)

Here, the fact that the DNA of other males in the apartment at the time Doe was passed out was ruled out, as well as the DNA of Doe's boyfriend with whom she had had consensual sex 48 hours before the party, coupled with the fact that defendant was in the apartment when Doe was passed out, creates a strong possibility that defendant raped Doe, and was the source of the semen found in her vagina. Based on the evidence before us, we find the trial court did not err in denying defendant's motion to suppress evidence, because the search warrant was supported by probable cause.

Leon Good Faith Exception

Even if we were to find the search warrant was not supported by probable cause in the present case, we find that the search of defendant was conducted in good faith reliance on the warrant. In *United States v. Leon* (1984) 468 U.S. 897, the Supreme Court held that evidence may not be suppressed if the officer executing the warrant relies in good faith on a warrant issued by a detached and neutral magistrate that later is determined to be invalid. An officer will have no reasonable grounds for believing the warrant was properly issued where the magistrate was misled by information in an affidavit which the officer knew or should have known was false, where the magistrate

wholly abandoned his judicial role, where the affidavit was so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable, or when the warrant was so facially deficient that the officer could not reasonably presume it to be valid. (*Id.* at p. 923.)

Application of the good faith exception requires a factual presentation of the officers' activity, which is then measured against a standard of objective reasonableness. (*Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 944.) This objective standard "requires officers to have a reasonable knowledge of what the law prohibits." (*United States v. Leon, supra*, 468 U.S. at p. 920, fn. 20.)

Here, there is no question that officers relied upon the warrant in this case in good faith. Defendant argues the affidavit in support of the warrant was so lacking in probable cause that a reasonable officer would have known the search was illegal despite the magistrate's authorization. However, the affidavit contained substantial information from the police investigation, including corroborating evidence of the officer's theory from the DNA tests of Smith, Beasley and Diaz. The affidavit stated that because three of the four men were eliminated because of their DNA test results, it was reasonable that defendant was the source of the semen. Based on this information, there was a fair probability that the search would reveal the information the police sought.

Therefore, based on the contents of the affidavit, the police relied upon the warrant in good faith in executing the search.

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.